MBf FINANCE BHD.

v.

PENDAFTAR HAKMILIK NEGERI PERAK & ANOR.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING MOTION NO. 25-1-90]
30 MAY 1990

LAND LAW: *Priorities - Registered charge - Registrar's caveat as a result of income tax owned - Indefeasibility of title - Whether statutory right to enter caveat creates an interest in land - Sections 320(1)(ba), 340 of National Land Code.*

STATUTORY INTERPRETATION: *Section 320(1)(ba) National Land Code - Meaning - Plain and unambiguous.*

The plaintiff was the registered chargor of the lands in question (the said lands), the charge was registered on 11 August 1983 as security for a loan. The owner of the said lands owed monies in the form of income tax to the Inland Revenue as a result of which a Registrar's caveat was entered on 22 October 1985.

The plaintiff applied to the Court for the removal of the Registrar's caveat and a declaration of the plaintiff's correct ranking in priority to that of the 2nd respondent.

The issue for determination was that of priority between the plaintiff and the Director-General.

Held:

[1] As a result of the decision in the *Temenggong* case, s. 320(1) of the National Land Code (the Code) was amended by the insertion of para. (ba).

[2] The words of para. (ba) are plain and unambiguous; although they create a statutory right to have a Registrar's caveat entered, they do not create any real interest in land or such interest as is recognized by the Code.

[3] The registered charge created an indefeasible title against all subsequent holders in the said land except for a few exceptions under s. 340 of the Code (which are not applicable on the facts of this case).

[4] There is no conflict between ss. 340 and 320(1)(ba) of the Code such that the latter section, being a later enactment, prevailed over s. 340.

[Plaintiff's application allowed]

Cases referred to:
Registrar of Titles, Johore v. Temenggong Securities Ltd. [1976] 2 MLJ 44
Eng Mee Yong v. V.Letchumanan [1979] 2 MLJ 212
Bank Bumiputra Malaysia v. Mahmud bin Mohd Din & Anor [1989] 1 CLJ (Rep) 326

Legislation referred to:
Estate Duty Enactment 1941, ss. 25(1), (ii)
National Land Code 1965, ss. 320(1), 340

Other source referred to:
Halsbury's Laws of England 46th Edn., Vol. 44

For the applicant - Selvanathan; M/s. Kean Chye & Sivalingam
For the 1st respondent - Azman bin Husin
For the 2nd respondent - Mohd. Bazain bin Idris

JUDGMENT

Peh Swee Chin J:

This case involved the interpretation of s. 320 of National Land Code (hereafter the Code) amended by Act A444 of 1979 which added, effective from 15 February 1979; a new paragraph to s. 320(1) and numbered as para. (ba). Section 320 as amended is set out below.

> Section 320(1). Subject to subsection (2), a Registrar's caveat may be entered in respect of any land wherever such appears to the Registrar to be necessary or desirable:
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> (a) for the prevention of fraud or improper dealing; or
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> (b) for protecting the interest of:
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> i) the federation or the state authority, or
>
> ii) any person who is in his opinion under the disability of minority, mental disorder or unsoundness of mind, or is shown to his satisfaction to be absent from the federation; or
>
> (ba) for securing that the land will be available to satisfy the whole or part of any debt due to the federation or the state authority, whether such debt is secured or unsecured and whether or not judgment thereon has been obtained; or
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> (c) by reason of some error appearing to him to have been made in the register or issue document of title to the land or any other instrument relating thereto. (2) Knowledge by the Registrar of the fact that any land or interest therein has been acquired, or is to be held, by any person or body in a fiduciary capacity shall not of itself constitute a ground for entering a Registrar's caveat in respect of that land.

The applicant or rather the plaintiff, (hereafter called the chargee) sought to remove a Registrar's caveat lodged by the 1st respondent or rather the 1st defendant at the behest of the 2nd respondent, or rather the 2nd defendant, (both defendants hereafter called the Registrar, and the Director-General respectively), claiming also a declaration of the chargee's right ranking in priority to that of the Director-General.

It could not be seriously disputed from the charge documents exhibited in evidence that the chargee was the registered chargor of the 2 pieces of land in question (hereafter the said lands), there being only a mere denial by the Director-General. The relevant charge was registered on 11 August 1983, for securing a loan of RM800,000.

The owner of the said lands, which were so charged, owed RM315,000 in income tax to the Inland Revenue. A letter dated 10 October 1985 on behalf of the Director-General was sent to the Registrar with a request to enter a Registrar's caveat in respect of the said lands and the Registrar duly entered it on 22 October 1985.

Learned Counsel for the chargee cited *Registrar of Titles of Johor v. Temenggong Securities Ltd.* [1976] 2 MLJ 44, submitting that the Registrar had a quasi-judicial function to perform and had acted *mala fide* in entering the impugned caveat as he should have noticed the registered charge. It was submitted that his decision "would undermine the economic foundation of this country for no bank would accept any more land as security."

On the issue of priority under the amended s. 320, learned Counsel submitted that the Director-General had no registrable interest in the said lands. By way of comparison of income tax with estate duty, s. 25 of the Estate Duty Enactment was cited which I set out below:

Section 25(1). Unless and until it is paid or otherwise satisfied, any estate duty payable upon any property passing on the death of a person to his executor or being under the control of such executor shall be a first charge on such other property and in either case any such estate duty shall be deemed to be a charge in respect of a sum already due and payable on demand together with interest accruing as provided in this Enactment: Provided that no property shall be so charged as against a *bona fide* purchaser thereof or in priority to a charge thereof or in priority to a holder of a lien thereover for valuable consideration and without notice:

Provided further that the burden of proving that any property comes within the provisions of the preceding proviso shall be on any persons interested to deny the existence or priority of the charge by this subsection imposed on such property.

Section 25(ii). At any rate after any estate duty has become a charge on property the title whereto is registered in any registry of titles or land office the Collector may certify the amount of such estate duty under his hand and official seal together with particulars of the document of documents of title to the property on which such estate duty is charged and may present such certificate to the proper registering authority who shall notwithstanding anything in the National Land Code contained thereupon himself make a memorial of the charge upon the register document of title to such property and such charge shall notwithstanding anything in the National Land Code contained, take priority of all other charges affecting such property registered or presented for registration or liens created under the National Land Code or otherwise subsequently to the death of the deceased.

It was further submitted that the Director-General as a caveator did not proceed to take action with haste as the caveat functioned like an interim injunction.

In reply, learned Senior Federal Counsel submitted that as a result of the decision of Privy Council in *Temenggong*, which held to the effect that Inland Revenue Department had no interest in the land to support a Registrar's caveat there; s. 320 was therefore amended to include the new para. (ba) as set out above. The entry by the Registrar of the caveat was therefore not *mala fide* and he had not exceeded his power.

It was further submitted that since Director-General had priority over the chargee, the Court therefore could not disturb the order of the Registrar in entering the caveat.

It was further submitted that there was a conflict between s. 340 of Act (dealing with indefeasibility of title) and s. 320(ba), having been enacted later in time, prevailed over s. 340.

It was lastly submitted that though on the one hand, there was no time limit to recover income tax for the Inland Revenue, the present action by the chargee on the other hand was barred by Public Authorities Protection Act 1948 having regard to the fact that the Registrar's caveat was lodged on 22 October 1985, (the motion here was filed on 13 January 1990), and therefore 3 years had expired.

Learned Counsel for chargee submitted his client had not been served with copy of Registrar's caveat; and could not be in a position to know about it. With this the Court agreed.

In my view, the only issue was who had priority over the other, i.e. as between the chargee and the Director-General.

It was the case of the Director-General that, the amended s. 320 had clothed the Director-General with such priority over the chargee. Let's examine the section, especially the para. (ba). The new para. (ba) very obviously enables the Director-General to request the Registrar to enter a Registrar's caveat, for the arrears of income tax, to quote: "... whether such debt is secured or unsecured and whether or not judgment thereon has been obtained".

It will be remembered that the Privy Council in *Temenggong* has held that the arrears of income tax did not create such an interest in land as was recognised by the Code for the Inland Revenue Department to lodge a caveat, but was merely an unsecured civil debt, which, until converted into a judgment debt, had no right over the property of the debtor (the tax payer there).

Thus the new para. (ba) undoubtedly creates an express statutory right for any government department such as Inland Revenue Department, in respect of any debt due to it from a land owner to request a Registrar of Titles to enter a Registrar's caveat, and the Registrar, in exercising his quasi-judicial discretion described by Lord Diplock in *Temenggong*, can no longer in my view, rely on the decision of *Temenggong*, in refusing to enter a Registrar's caveat on the ground that the debt could not come within the word "interest" in s. 320(1) of the Code. In view of the wording of the new para. (ba), the Registrar has no longer any discretion in refusing to enter such a caveat. It brings to mind some legislation in some sort of analogical mould, e.g. Essential (Protection of Deposits) Regulations 1986 which enable the Bank Negara or Central Bank to petition to Court for winding up a deposit-taking company though not being one of a recognised group of petitioners such as a contributory, creditor etc. The Bank Negara, though qualified to petition for such winding up obtains no interest of any kind of itself in the assets of the company.

It would be necessary to construe the new para. (ba) for its true effect.

At para. 856 of *Halsbury's Laws of England* 4th Edn., Vol. 44, at p. 522 it states:

> 855. **Statutes and other documents construed alike.** The canons of construction with regard to statutes do not, in effect, differ from those applicable to all documents.
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> 856. **Ascertaining the intention of Parliament.** The object of all interpretation of a written instrument is to discover the intention of the author as expressed in the instrument. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. This intention, and therefore the meaning of the statute, is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand, however strongly it may be suspected that the result does not represent the real intention of Parliament.
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> 857. **Construction where statute is unambiguous.** If the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning.

Thus, if the words of the new para. (ba) are plain and unambiguous, it would neither be legitimate nor necessary to look elsewhere for their meaning. They are plain and unambiguous. Apart from creating an *ad hoc* statutory right to insist on the Registrar entering a Registrar's caveat, I find it quite impossible for them to create any real interest in land or such interest as is recognised by the Code, though they create a statutory right to have a Registrar's caveat entered. They do not create any charge or lease. In this connection, s. 25(1) of the Estate Duty Enactment 1941 expressly creates a charge for estate duty owing to the Collector of Estate Duty, subject to a proviso expressly providing that no property shall be so charged against a *bona fide* purchaser, or in priority to a charge etc. Paragraph (ba) of the Code, by comparison, patently fails to create a charge. Neither do I think that the words can even create a prohibitory order which is entered pursuant to a judgment. The tax liability, not yet converted into a judgment can give rise to no right to apply to any Court for a prohibitory order.

Applying the test laid down by Privy Council in *Eng Mee Yong v. V.Letchumanan* [1979] 2 MLJ 212, the onus would be for the caveator, and in the instant case, the party in the shoes of a caveator, who had requested the Registrar to enter a Registrar's caveat for his benefit, i.e. the Director-General to satisfy this Court that on the evidence presented to it, it did raise a serious question to be tried as to his claim to an interest in land as recognised by the Code. The first hurdle against the Director-General desirous of having the caveat remaining on the register proved to be insurmountable for no interest of the kind has been created by the new para. (ba).

Assuming for the sake of the argument that the arrears of income tax did create an interest in land (though there is nothing of the kind); such interest in any event would have to give way to the prior interest of the registered charge in this case. The registered charge created an indefeasible title against the all subsequent holders of interests in the said lands except for a few exceptions set out under s. 340 of the Code which did not apply to the instant case, please see *Bank Bumiputra Malaysia v. Mahmud bin Mohd Din & Anor* [1989] 1 CLJ (Rep) 326.

In this connection, learned Senior Federal Counsel's submission that s. 340 of the Code should be overridden by the new para. (ba), the latter being the later enactment, to make sense, could depend only on the premise which did not exist i.e. the premise that para. (ba) had created some interest in land not only recognised by the Code, but also expressly or by some irresistible implication provided by it to override all interests in the land, whether prior or subsequent ones. The new paragraph could never aspire to achieve such strange result; if it could, it would indeed be mind-boggling to think that the principle of indefeasibility of title as enshrined in s. 340 of the Code, forming the main pillar of the Torrens Systems would be swept away thereby for the purpose of s. 320 of the Code.

In the absence of the said premise, I could find no conflict between s. 340 and the new para. (ba) of s. 320 of Code such that the new para, being a later enactment, prevailed over the s. 340.

It would seem idle if I am to give further views by assuming the creation of some nondescript interest in land by the new para. (ba).

I therefore granted an order in terms of the motion, i.e. ordering the removal of the Registrar's caveat in question etc. I further ordered the 2nd defendant (the Director-General) to pay costs but made no order of costs against the 1st defendant (the Registrar).

Also found at [1990] 2 CLJ 644